BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RANDALL V. EVANS	)	
Claimant	)	
	)	
VS.	)	
	)	
AEROTEK	)	
Respondent	)	Docket No. 1,042,073
	)	
AND	)	
	)	
AMERICAN INTERNATIONAL SOUTH INS	)	
Insurance Carrier	)	

ORDER

Respondent requests review of the December 5, 2008 preliminary hearing Order entered by Administrative Law Judge Thomas Klein (ALJ).

ISSUES

The ALJ ordered respondent to pay temporary total disability at the previous rate commencing November 20, 2008 until claimant is released on his back and knee claims. He also authorized Dr. Walker to treat claimant's right knee and ordered respondent to provide claimant with a list of 3 physicians from which to choose an authorized treating physician for his back.[1] This Order does not contain any factual findings or legal conclusions with respect to the underlying compensability issues.

The respondent requests review of this Order alleging the ALJ exceeded his jurisdiction in finding that claimant's knee injury arose out of and in the course of his employment and that claimant provided timely notice.

Claimant argues that the ALJ should be affirmed in all respects.

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[1] ALJ Order (Dec. 5, 2008).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

There is no dispute that claimant sustained a compensable injury to his back on August 14, 2008. Claimant testified that he was "bucking rivets" when the dolly he was standing on slipped out from under him. As a result he twisted his back and caught his knee on the concrete while falling into a fuselage. He reported his injury and 4 days later a report of injury was completed by someone else and presented to him. That document contains a reference to low back pain and "legs pain". The description of the accident is consistent with claimant's testimony and refers to lower back and leg problems as a result of the accident.

Claimant was referred to Dr. Mark Dobyns for treatment. Claimant and his wife both testified that claimant told Dr. Dobyns of his knee problems during the first visit, but for whatever reason Dr. Dobyns' records do not reflect this complaint. Claimant was referred for physical therapy. Dr. Dobyns continued to focus on claimant's back problem and made no reference to knee complaints until September 26, 2008.

At this point Dr. Dobyns ceased the physical therapy regimen and referred claimant to another physician for an evaluation of his knee complaints. Dr. Dobyns' records indicate that claimant **did not** tell him of right knee complaints until the September 26, 2008 visit.

All treatment was suspended and that triggered the preliminary hearing process. Claimant maintains that he not only told respondent the full extent of his injury on the date of the accident, but also gave notice in the report of accident. And that he has always maintained both to the employer and to Dr. Dobyns that he injured his right knee as well as his low back in the August 14, 2008 accident.

Respondent essentially argues that claimant's credibility is so lacking that his contention that he hurt his right knee in the accident cannot be believed. To support this argument respondent points to the fact that claimant cannot identify by name the individuals he gave notice to. Respondent also points to a lack of any entry within Dr. Dobyn's medical records to corroborate claimant's right knee complaints and to the accident report of August 18, 2008, which references "legs" rather than "right leg" only.

Although it is difficult to know from the Order itself, it would certainly appear that the ALJ found in claimant's favor on both of the compensability issues present at this juncture of the claim. The ALJ ordered the benefits claimant sought and therefore, he must have concluded not only did claimant suffer a right knee injury in the August 14, 2008 accident but he also gave timely notice. And after reviewing the entire record, as presently developed, this Board Member finds the Order should be affirmed.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[2] A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."[3] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[4] The existence, nature and extent of the disability of an injured workman is a question of fact.[5] A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.[6] The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.[7]

Here, there is no dispute that claimant sustained an injury to his back on August 14, 2008. He gave notice to a supervisor, who he admittedly cannot name. But the fact remains that an accident report was created and it was signed by claimant on August 18, 2008. That document itself establishes not only that the accident occurred just as claimant says it did but that he injured his low back. That document also references "legs" while claimant maintains that he always contended that it was just his right leg that was involved in the accident.

This Board Member finds that the fact that claimant cannot, under these circumstances, identify the individual he gave notice to is essentially insignificant. Claimant is a contract worker who is asked to work at various places over any given time. He cannot be expected to remember the names of individuals that he only periodically meets or comes into contact with. Moreover, the fact that his notice to respondent through the accident report references low back and legs versus the singular leg is, again under these circumstances, largely irrelevant. Claimant did not complete that document he merely signed it. To compel claimant to the preciseness that respondent appears to desire is wishful thinking.

As for the absence of complaint in Dr. Dobyns' records, that is more problematic. Claimant maintains he told Dr. Dobyns of the right knee problems. His wife echos that

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[2] K.S.A. 2008 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[3] K.S.A. 2008 Supp. 44-501(a).

[4] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[5] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

[6] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[7] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

contention. Claimant says that Dr. Dobyns was largely concerned with the low back complaints and getting claimant into physical therapy. Based upon this testimony and the finding of the ALJ, who witnessed both claimant and his wife testify, it would appear the ALJ was persuaded by claimant and the totality of his evidence.

The Board has, in the past, deferred to ALJ's decisions as they are often times in the best position to evaluate a witnesses' demeanor and credibility. In this case this Board Member finds that approach to be appropriate. The ALJ's Order is affirmed. Although in the future, the ALJ is counseled to provide more detailed orders so that a meaningful review can be accomplished.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[8] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated December 5, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2009.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
Brenden W. Webb, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[8] K.S.A. 44-534a.